Calendar No. 586

100TH CONGRESS
2d Session

SENATE

REPORT
100-300

SELECTION OF CASES IN THE SUPREME COURT

MARCH 16 (legislative day, MARCH 14), 1988.—Ordered to be printed

Mr. BYRD (for Mr. BIDEN), from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 952]

The Committee on the Judiciary, to which was referred the bill S. 952, to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, having considered the same, reports favorably thereon, with amendments, and recommends that the bill, as amended, do pass.

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I. PURPOSE

The bill substantially eliminates the mandatory or obligatory jurisdiction of the Supreme Court. Under current law, certain cases may be appealed directly to the Supreme Court and the Court is obligated to hear and decide those cases. In most instances, these cases do not involve important issues of Federal constitutional law. The net effect of this bill is to convert the method of Supreme Court review to a discretionary certiorari approach.

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This change in appellate review is supported by the current members of the Supreme Court as reflected in a letter from Chief Justice William Rehnquist to Senator Howell Heflin, Chairman of the Subcommittee on Courts and Administrative Practice on November 17, 1987. Chief Justice Rehnquist stated:

> A unanimous Court has reiterated its support for this type of bill on several occasions during the past decade including letters to Congressional leaders in 1984, 1982 and 1978. I am authorized and pleased to again transmit the unanimous view of the Supreme Court endorsing elimination of the Court's mandatory jurisdiction.[1]

The Chief Justice also responded to a request of Representative Kastenmeier, Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, to present the views of the Court concerning legislation affecting the Court's mandatory appellate jurisdiction:

> Some comment on the Court's practice in handling cases may help explain our reasons for seeking the elimination of mandatory appellate jurisdiction. The Court now receives over 5,000 annual requests for review, yet there are only approximately 160 hours available for oral argument, therefore, the Court is only able to hear argument in approximately 175 cases. The number of mandatory appeals filed is relatively small (220 in the 1986 Term); however, 39 of the 175 cases (22 percent) argued last Term were appeals. Our records show that 41 percent of the argued appeals resulted in affirmances compared to 33 percent of the argued petitions for certiorari. These figures suggest that appeals not only take up a disproportionate amount of the Court's resources but may do so at the expense of petitions for certiorari which might otherwise have been granted. Unfortunately, there is no way of knowing how many of the appeals would have been granted as petitions for certiorari.[2]

II. Background

The general effect of Senate bill 952 is to convert the mandatory or obligatory jurisdiction of the Supreme Court to review by certiorari, except for a narrow range of cases involving decisions by three-judge district courts.

In many ways this legislation is the logical culmination of a series of legislative steps over the past century that have transformed the nature of the Supreme Court. A review of the history of the appellate jurisdiction of the Supreme Court is helpful in understanding this transformation. See generally Simpson, "Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdic-

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[1] Letter from Chief Justice William Rehnquist to Hon. Howell Heflin, chairman, Subcommittee on Courts and Administrative Practice, Committee on the Judiciary, U.S. Senate, dated Nov. 17, 1987. Note: At the time this letter was sent, there was a vacancy on the Court because of the retirement of Justice Lewis Powell.

[2] Letter from Chief Justice William Rehnquist to Hon. Robert Kastenmeier, chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, dated Dec. 2, 1987.

tion of the Supreme Court," 6 Hastings L.Q. 297 (1978) (hereinafter Simpson); Wechsler, "The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review," 34 Wash. and Lee L. Rev. 1043 (1977).

Any attempt to abolish most of the remaining categories of appeals to the Supreme Court, in the manner provided by S. 952, must include consideration of the jurisdictional nature of an "appeal."

To begin with, an "appeal" to any Federal appellate court, including the Supreme Court, is solely a creature of legislative choice. *Heike* v. *United States,* 217 U.S. 423, 428 (1910). There is no constitutional requirement or compulsion to provide an absolute right to appeal from any kind of judicial decision, Federal or State. Congress is not compelled by Article III of the Constitution or by the dictates of due process to provide aggrieved litigants with any absolute right to take an "appeal" to the Supreme Court. See, e.g., *District of Columbia* v. *Clawans,* 300 U.S. 617, 627 (1937). In establishing the Court's appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necssary and proper, including such exceptions as Congress thinks appropriate. If Congress wants to make the Court's appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution would prevent such action. See Ex parte *McCardle,* 7 Wall. 506 (1869).

In the Federal judicial system an "appeal" in the technical sense always has been reflective of a so-called absolute right by an aggrieved party to call upon an appellate court to review and to resolve the merits of a lower court's ruling.[3] The right to invoke the appellate court's decisional powers is conditioned solely on compliance with whatever jurisdictional and other formal requirements may be established by statute or rule, such as the requirements of timely filing and finality of the decision below.

The Supreme Court has always conceived of statutes designed to confer such an absolute right to appeal, as also conferring on the Court a correlative obligation to rule on the merits of the questions involved in the appeal, assuming again that the formal jurisdictional requirements have been met. The right to appeal, and the corresponding duty to decide the merits of an appeal, appear to have evolved out of the early days of the Federal judiciary, when there was adequate time to dispose of every appeal on its merits and when the need for developing discretionary limitations and short cuts in disposing of enormous case filings was yet unknown. From those halycon days has developed the firm notion—presumably acquiesced in by Congress—that an "appeal" invokes and involves the "obligatory jurisdiction" of the Court, i.e. a jurisdiction that obliges the Court to hear and dispose of the appeal on its merits.[4]

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[3] An appeal as of right, for example, exemplifies most proceedings in the Federal courts of appeals designed to review final judgments of Federal district courts. See 28 U.S.C. Section 1291.

[4] Congress generally does not spell out any obligation of the Court to decide the merits of an appeal; for the most part, the obligation appears to have been a judicial assumption premised upon an era when discretionary jurisdiction had not been conceived. The obligatory jurisdiction presently specified in 28 U.S.C. section 1257 (1) and (2), for example, simply provides that certain kinds of State court decisions may be reviewed by the Supreme Court "by appeal."

From the time of the very first Congress, the Supreme Court has had appellate authority over State court cases. The Judiciary Act of 1789, section 25, 1 Stat. 73, 85–87, provided that specific types of Federal and State cases could be reviewed only "upon a writ of error". This "writ of error" procedure made virtually all cases subject to the possibility of obligatory appellate review by the Supreme Court. See *Simpson,* supra, at 301–307. Thus, for the first century the Supreme Court docket was largely made up of cases within the Court's obligatory jurisdiction.

The first erosion of the practice of mandatory appellate jurisdiction by the Supreme Court took place in 1891 with the passage of the Evarts or Circuit Courts of Appeals Act. 26 Stat. 826. This Act provided for the first time that the Supreme Court would have control over its docket to the extent that it had discretion to decide whether to hear certain cases decided by the newly created circuit courts of appeal. These cases included cases involving diversity, revenue laws, patent laws, Federal criminal laws, and admiralty. See P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System Act, at 40–41 (2nd Ed. 1973).

Many proponents of the 1891 Act felt that the creation of a new tier of Federal appellate courts would eliminate the caseload pressures on the Supreme Court. Yet despite this action, the growth of the Supreme Court caseload continued unabated. Finally, in 1925 Congress responded. In the Judges Act of 1925, 43 Stat. 936, the scope of mandatory appellate review was narrowed and the role of certiorari or discretionary review expanded. Thus, for the vast majority of cases the Court obtained the authority to select for review and disposition those cases it considered of national importance.

But the 1925 Act did not destroy all manifestations of obligatory jurisdiction. Numerous statutory authorizations of appeals were left untouched, carrying with them the historic notion that the Court is obligated to dispose of them by resolving the merits of the questions presented.

Appeals have continued to play a significant role in the Court's workload. Although there were only 220 mandatory appeals in the 1986 term, this represented 22 percent of the cases argued before the Supreme Court.[5]

History has shown that imposing such mandatory functions on the Supreme Court tends to weaken the Court's capacity both to control its own docket and to confine its labors to those cases of national importance. History has further shown that the Court, in an effort to counteract the workload problems of this compulsory jurisdiction, has increasingly disposed of "insubstantial" appeals in summary ways that the bar, if not inconsistent, with the nondiscretionary theory underlying the disposition of appeals.

This inevitable confusion has been recognized by the Court. A 1982 letter signed by all nine justices illustrates this point:

> It is impossible for the court to give plenary consideration to all the mandatory appeals it receives; to have done so during the 1980 term would have required at least

[5] Letter from Chief Justice Rehnquist to Congressman Kastenmeier, dated Dec. 2, 1987.

> 9 additional weeks of oral argument or a seventy-five percent increase in the argument calendar. To handle the volume of appeals presently being received, the Court must dispose of many cases summarily, often without written opinion. Unfortunately, these summary decisions are decisions on the merits which are binding on the state courts and other federal courts. See *Mandel* v. *Bradley,* 432 U.S. 172 (1977); *Hicks* v. *Miranda,* 422 U.S. 332 (1975). Because they are summary in nature these dispositions often also provide uncertain guidelines for the courts that are bound to follow them and, not surprisingly, such decisions sometimes create more confusion than they seek to resolve.[6]

In the 1970s, Congress eliminated a number of categories of cases requiring mandatory appellate jurisdiction. Congress provided for certiorari-type review of criminal cases under Title 18 U.S.C. Section 3731. In 1974, Congress abolished virtually all direct appeals to the Supreme Court from district court determinations in civil actions brought to enforce the antitrust laws and the Interstate Commerce Act. 88 Stat. 1706. In 1975, Congress transferred from the Supreme Court, to various Courts of Appeals, appellate jurisdiction over certain cases involving orders of the Interstate Commerce Commission. Finally, and most importantly, in 1976 Congress repealed most of the requirements for convening three-judge district courts, thereby eliminating the need for direct mandatory appellate review for this category of cases. 90 Stat. 1119.

The 1976 legislation, however, did not entirely eliminate the use of three-judge district courts in the Federal system or direct appeal to the Supreme Court from three-judge court determinations (28 U.S.C. 1253). The Court still retains appellate jurisdiction over three-judge courts convened to consider reapportionment matters (28 U.S.C. 2284(a)), to consider extraordinary matters arising under the Civil Rights Act of 1964 (42 U.S.C. 2000a–5, 2000a–6), to consider various matters arising under the Voting Rights Act of 1965 and related statutes (see 42 U.S.C. 1971(g) and 1973 (b) and (c)), and to consider actions brought under the Presidential Election Campaign Fund Act (26 U.S.C. 9010(c)).

Studies of the jurisdiction of the courts in the late 1970s recommended conversion of appellate jurisdiction to discretionary review. The Department of Justice Committee on Revision of the Federal Judicial System, which studied the matter in 1976, took the position that the obligatory jurisdiction should be eliminated. The Study Group on the Caseload of the Supreme Court (the "Freund" Committee) had earlier advocated the same change. The Commission on Revision of the Federal Appellate Court System, chaired by then Senator Roman Hruska, also emphasized the burden and uncertainty caused by the obligatory appellate jurisdiction.[7]

Traditionally, abolition of the Supreme Court's mandatory jurisdiction has been supported by the justices of the Supreme Court,

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[6] Letter from Chief Justice Warren E. Burger to Congressman Kastenmeier, dated June 17, 1982.

[7] Commission on Revision of the Federal Appellate Court System, Structure and Internal Procedures: Recommendations for Change, p. 6

the Judicial Conference of the United States, the Department of Justice and the American Bar Association.

The majority of the Court's remaining mandatory jurisdiction can be found in 28 U.S.C. 1252; 28 U.S.C. 1254(2); 28 U.S.C. 1257 (1) and (2), and 28 U.S.C. 1258 (1) and (2).

Senate bill 952 makes these four categories, and several other statutes which are now subject to mandatory appellate review, subject to review by writ of certiorari.

III. Legislative History

Senator Bumpers introduced the first legislation concerning mandatory appellate review in the 95th Congress, S. 83. In the 96th Congress, Senator DeConcini introduced S. 450. The Senate passed S. 450 but there was no further action in the House. See S. Rep. 96-35 (1979); see also Hearings before the subcommittee on Improvements in the Judicial Machinery, Senate Committee on the Judiciary on the Supreme Court Jurisiction Act of 1978, 95th Congress 2d. Session (1981).

In the 97th Congress, Senator Howell Heflin introduced S. 1531 which was approved by the Subcommittee on Courts, but which was not considered by the full Judiciary Committee.

In the 98th Congress, Senator Howell Heflin again introduced legislation concerning the obligatory jurisdiction of the Supreme Court. S. 385 was introduced on February 2, 1983, and a similar provision was included as Title 1 in S. 645, an omnibus court reform package. S. 645 was introduced by Senator Dole and was reported by the Subcommittee on Courts to the full Judiciary Committee. Certain titles of S. 645 were later incorporated into other bills, but there was no further action on Title 1.

In the 99th Congress, Senator Heflin again introduced legislation to eliminate mandatory appellate review by the Supreme Court for certain types of cases. S. 833 was introduced on April 2, 1985. There was no action taken on the legislation.

In the 100th Congress, Senator Howell Heflin, Chairman of the Subcommittee on Courts and Administrative Practice introduced S. 952 on April 8, 1987, for himself and Senator Charles Grassley, the ranking member of the Subcommittee. The subcommittee held a mark-up on the legislation on November 18, 1987. At the subcommittee mark-up, Senator Heflin offered several amendments which were considered en bloc and were adopted by the subcommittee. On December 3, 1987, S. 952, as amended, was unanimously adopted by the Senate Judiciary Committee.

IV. Amendments Adopted by the Subcommittee on Courts and Administrative Practice

Amendment No. 1

On page 3, after line 23, add the following:

> (c) Section 2103 to title 28, United States Code, and the item relating to such section in the table of sections for chapter 133 of such title are repealed.

AMENDMENT NO. 2

On page 4, line 1, strike out "(c)" and insert in lieu thereof "(d)".
On page 4, line 12, strike out "(d)" and insert in lieu thereof "(e)".

AMENDMENT NO. 4

On page 4, line 18, before the period insert the following:
, and by striking out "(a)" before "The Commission".

AMENDMENT NO. 5

On page 6, strike out lines 8 through 10 and insert in lieu thereof the following:

(g) Section 206 of the International Claims Settlement Act of 1949 (22 U.S.C. 1631e) is amended by striking out "sections 1252, 1254, 1291, and 1292" and inserting in lieu thereof "chapter 83".

AMENDMENT NO. 6

On page 6, between lines 14 and 15, insert the following:

(i) Section 25(a)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136w(a)(4)) is amended by repealing clause (ii) of subparagraph (E) and redesignating clause (iii) as (ii).

V. Explanation of Amendments Adopted in Subcommittee

The first amendment repeals Section 2103 of Title 28, United States Code. This section currently provides that if an appeal is improvidently taken from a decision of a State supreme court or U.S. court of appeals, where the proper mode of review is by writ of certiorari, the case shall not be dismissed solely on those grounds. The petition shall be treated as a petition for certiorari.

Since mandatory appeals from these courts will no longer exist after enactment of this legislation, Section 2103 is superfluous.

The second and third amendments amend S. 952 as introduced and simply redesignate subsections.

The fourth amendment is technical in nature. S. 952 deletes Subsection (b) of Title 2 of United States Code Section 437(h). This amendment merely deletes the reference to the letter (a) in the statute as codified. The bill as introduced did not alter the paragraphing.

The fifth amendment amends Section 296 of the International Claims Settlement Act of 1949. Currently, Title 22 of the United States Code Section 1631(e), permits direct appeal to the Supreme Court or to the court of appeals. The effect of this amendment is to provide that initial review must be to the court of appeals with the right to seek review by the Supreme Court by writ of certiorari.

The sixth amendment is substantive in nature. It provides for review by writ of certiorari for cases brought under the Federal Insecticide, Fungicide, and Rodenticide Act, thereby deleting the provision providing for mandatory review by appeal.

VI. Text of S. 952 as Reported by the Committee on the Judiciary

[S. 952, 100th Cong., 1st Sess.]

A BILL To improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 1252 of title 28, United States Code, and the item relating to that section in the section analysis of chapter 81 of such title, are repealed.

REVIEW OF DECISIONS INVALIDATING STATE STATUTES

SEC. 2. (a) Section 1254 of title 28, United States Code, is amended by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2).

(b) The section heading for section 1254 of such title is amended by striking out "appeal;".

(c) The item relating to section 1254 in the section analysis of chapter 81 of title 28, United States Code, is amended by striking out "appeal;".

REVIEW OF STATE COURT DECISIONS INVOLVING VALIDITY OF STATUTES

SEC. 3. Section 1257 of title 28, United States Code, is amended to read as follows:

"§ 1257. State courts; certiorari

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

"(b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

REVIEW OF DECISIONS FROM SUPREME COURT OF PUERTO RICO

SEC. 4. Section 1258 of title 28, United States Code, is amended to read as follows:

"§ 1258. Supreme Court of Puerto Rico; certiorari

"Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Con-

stitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONFORMING AMENDMENTS

SEC. 5. (a) The items relating to sections 1257 and 1258 in the section analysis of chapter 81 of title 28, United States Code, are amended to read as follows:

"1257. State courts; certiorari.

"1258. Supreme Court of Puerto Rico; certiorari.".

(b) Section 2101(a) of title 28, United States Code, is amended by striking out "sections 1252, 1253 and 2282" and inserting in lieu thereof "section 1253".

(c) Section 2103 of title 28, United States Code, and the item relating to such section in the table of sections for chapter 133 of such title are repealed.

(d)(1) Section 2104 of title 28, United States Code, is amended to read as follows:

"§ 2104. Reviews of State court decisions

"A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.".

(2) The item relating to section 2104 in the section analysis of chapter 133 of title 28, United States Code, is amended to read as follows:

"2104. Reviews of State court decisions.".

(e) Section 2350(b) of title 28, United States Code, is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

AMENDMENTS TO OTHER LAWS

SEC. 6. (a) Section 310 of the Federal Election Campaign Act of 1971 (2 U.S.C. 437h) is amended by repealing subsection (b) and by striking out "(a)" before "The Commission".

(b) Section 2 of the Act of May 18, 1928 (25 U.S.C. 652), is amended by striking out ", with the right of either party to appeal to the United States Court of Appeals for the Federal Circuit".

(c) The last sentence of section 203(d) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1652(d)) is amended to read as follows: "An interlocutory or final judgment, decree, or order of such district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.".

(d) Section 209(e)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(e)(3)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(e) Section 303(d) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743(d)) is amended to read as follows:

"(d) REVIEW.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States. Such review is exclusive and any such petition shall be filed in the Supreme Court not more than 20 days after entry of such finding or determination.".

(f) Section 1152(b) of the Omnibus Budget Reconciliation Act of 1981 (45 U.S.C. 1105(b)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(g) Section 206 of the International Claims Settlement Act of 1949 (22 U.S.C. 1631e) is amended by striking out "sections 1252, 1254, 1291, and 1292" and inserting in lieu thereof "chapter 83".

(h) Section 12(a) of the Act of May 13, 1954, commonly known as the Saint Lawrence Seaway Act (33 U.S.C. 988(a)), is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

(i) Section 25(a)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136w(a)(4)) is amended by repealing clause (ii) of Subparagraph (E) and redesignating clause (iii) as (ii).

EFFECTIVE DATE

SEC. 7. The amendments made by this title shall take effect ninety days after the date of the enactment of this title, except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date.

VII. SECTION-BY-SECTION ANALYSIS

Section 1. This section repeals Section 1252 of Title 28. Section 1252 provides for direct appeal to the Supreme Court of decisions of the lower courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties.

Under usual circumstances, any lower federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review. This substitution of a discretionary review mechanism for direct appellate review should not affect the frequency of Supreme Court review.

In addition, for cases requiring expedited treatment, it is also possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals. See 28 U.S.C. 1254(1).

Section 2. This section repeals paragraph (2) of Section 1254 of Title 28 U.S.C. Section 1254(2) authorizes direct appeal by a party, relying on a State statute held to be invalid on Federal grounds by a U.S. court of appeals. Review of such cases to the Supreme Court would be by writ of certiorari.

Section 3. This section amends Section 1257 of Title 28 U.S.C. Currently Section 1257(1) provides for review by direct appeal to the Supreme Court of a case where the highest court of a State has declared a Federal statute or treaty invalid.

Section 1257(2) provides for direct appeal to the Supreme Court in those cases where the highest court of a State upholds a State statute in the face of a challenge based on Federal law. As amended, Section 1257 would provide for review by writ of certiorari.

Section 4. This section converts the appellate mechanism for decisions of the Supreme Court of Puerto Rico into certiorari review.

Section 5. This section makes technical amendments to the sectional analysis of Title 28 and makes conforming amendments necessitated by the previous sections.

Section 6. This section amends various provisions of the United States Code where the Supreme Court currently is obligated to hear appeals directly. This amendment would provide for review by the Supreme Court by writ of certiorari in the statutes listed.

Subsection (a) of this section relates to actions brought under the Federal Election Campaign Act. After the Supreme Court decision in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), authority for direct appellate review by the Supreme Court is not necessary.

Subsection (b) deletes the phrase in Section 652 of Title 25 concerning suits by California Indians against the United States, which provides for right of appeal to the United States Court of Appeals for the Federal Circuit. All claims from the United States Claims Court are subject to review by the Federal Circuit Court of Appeals automatically under Section 1295 of Title 28 U.S.C., and therefore this language is superfluous.

Subsection (c) of this section relates to actions brought under the Alaska Pipeline Authorization Act. Any actions brought pursuant to this section for review in the Supreme Court would be by writ of certiorari.

Subsections (d) and (e) provide that the exclusive mechanism for review in the Supreme Court for actions brought under the Regional Rail Reorganization Act of 1973 is by writ of certiorari. These subsections amend existing law which provides for review by direct appeal.

Subsection (f) amends a provision of the Omnibus Budget Reconciliation Act of 1981 concerning the Northeast Rail Service, provides for review in the Supreme Court of a judgment of the special court by writ of certiorari and deletes the references to direct appeal to the Supreme Court.

Subsection (g) makes technical amendments to the International Claims Settlements Act of 1949.

Subsection (h) makes technical amendments to the Saint Lawrence Seaway Act.

Subsection (i) relates to actions brought under the Federal Insecticide, Fungicide, and Rodenticide Act. Any actions brought pursu-

ant to this statute must be reviewed in the Supreme Court by writ of certiorari.

Section 7. This section provides that the effective date of the legislation is 90 days after the date of enactment, except that these amendments do not apply to cases pending in the Supreme Court or affect the rights to review or the manner of reviewing the judgment or decree of a court, which was entered before the effective date.

VIII. Congressional Budget Office Estimate

In compliance with paragraph 11(a), rule XXVI of the Standing Rules of the Senate, the committee estimates that enactment of this legislation will involve no direct additional expenditure to the Government. The committee notes the following letter from the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, December 8, 1987.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 952, a bill to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes, as ordered reported by the Senate Committee on the Judiciary, December 3, 1987. We estimate that no cost to the federal government or to state or local governments would result from enactment of this bill.

S. 952 would give the Supreme Court greater discretion in selecting the cases it will review by eliminating the mandatory review of cases that the Supreme Court currently must decide on the merits. Review of such cases would be by writ of certiorari rather than by appeal. Based on information from the Administrative Office of the U.S. Courts, CBO estimates that enactment of this bill would result in no cost to the federal government.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Edward M. Gramlich,
Acting Director.

IX. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the Act will not have a direct regulatory impact.

X. Vote by the Committee

On December 3, 1987, with a quorum present, the Committee on the Judiciary (by voice vote) ordered S. 952 reported as amended.

XI. CHANGES IN EXISTING LAW

UNITED STATES CODE

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TITLE 2—THE CONGRESS

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CHAPTER 14—FEDERAL ELECTION CAMPAIGNS

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§ 437h. Judicial review

[(a)] ACTIONS, INCLUDING DECLARATORY JUDGMENTS, FOR CONSTRUCTION OF CONSTITUTIONAL QUESTIONS; ELIGIBLE PLAINTIFFS; CERTIFICATION OF SUCH QUESTIONS TO COURTS OF APPEALS SITTING EN BANC.—The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[(b) APPEAL TO SUPREME COURT; TIME FOR APPEAL.—Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.]

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TITLE 7—AGRICULTURE

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CHAPTER 6—INSECTICIDES AND ENVIRONMENTAL PESTICIDE CONTROL

* * * * * * *

§ 136w. Authority of Administrator

(a) REGULATIONS.—

* * * * * * *

(4) RULE AND REGULATION REVIEW.—

* * * * * * *

[(E) JUDICIAL REVIEW.—(i) Any interested party, including any person who participated in the rulemaking involved, may institute such actions in the appropriate dis-

trict court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this paragraph. The district court immediately shall certify all questions of the constitutionality of this paragraph to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[(ii) Notwithstanding any other provision of law, any decision on a matter certified under clause (i) of this subparagraph shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought not later than 20 days after the decision of the court of appeals.]

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TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

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CHAPTER 81—SUPREME COURT

Sec.
1251. Original jurisdiction.
1252. [Direct appeals from decisions invalidating Acts of Congress.] *Repealed.*
1253. Direct appeals from decisions of three-judge courts.
1254. Courts of appeals; certiorari; [appeal;] certified questions.
[1255, 1256. Repealed.]
1257. State courts; [appeal;] certiorari.
1258. Supreme Court of Puerto Rico; [appeal;] certiorari.
1259. Court of Military Appeals; certiorari.

§ 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

[§ 1252. Direct appeals from decisions invalidating Acts of Congress

[Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

[A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme

Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.]

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§1254. Courts of appeals; certiorari; [appeal;] certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

[(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;]

[(3)] *(2)* By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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[§ 1257. State courts; appeal; certiorari

[Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

[(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

[(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

[(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

[For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.]

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the valid-

ity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

[§ 1258. Supreme Court of Puerto Rico; appeal; certiorari

[Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

[(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

[(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

[(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.]

§ 1258. Supreme Court of Puerto Rico; certiorari

Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico or of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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SUBCHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

Sec.

2101. Supreme Court; time for appeal or certiorari; docketing; stay.
2102. Priority of criminal case on appeal from State court.
[2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari.]
[2103. Repealed.]
[2104. Appeals from State courts.]
2104. Review of State court decisions.
2105. Scope of review; abatement.
2106. Determination.
2107. Time for appeal to court of appeals.
2108. Proof of amount in controversy.
2109. Quorum of Supreme Court justices absent.

[2110. Repealed.]
2111. Harmless error.
2112. Record on review and enforcement of agency orders.
2113. Definition.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under [sections 1252, 1253 and 2282] *section 1253* of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

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[§ 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

[If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.]

[§ 2104. Appeals from State courts

[An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States.]

§ 2104. Review of State court decisions

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.

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CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

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§ 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be

made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section [1254(3)] *1254(2)* of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

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TITLE 22—FOREIGN RELATIONS AND INTERCOURSE

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CHAPTER 21—SETTLEMENT OF INTERNATIONAL CLAIMS

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§ 1631e. Rules by district courts; appeals

The district courts of the United States are given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this subchapter, with a right of appeal from the final order or decree of such court as provided in [sections 1252, 1254, 1291, and 1292] *chapter 83* of Title 28.

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TITLE 33—NAVIGATION AND NAVIGABLE WATERS

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CHAPTER 19—SAINT LAWRENCE SEAWAY

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§ 988. Rates of charges or tolls

(a) NEGOTIATION WITH CANADIAN AUTHORITIES; REVENUE SHARING FORMULA; CONSIDERATION OF AMERICAN FINANCING COSTS, INCLUDING INTEREST AND DEBT PRINCIPAL; RULES OF MEASUREMENT; HEARINGS AND REHEARINGS; APPROVAL BY PRESIDENT; COURT REVIEW.—

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The court in which such petition is filed shall have the same jurisdiction and powers as in the case of petitions to review orders of the Federal Energy Regulatory Commission filed under section 825*l* of Title 16. The judgment of the court shall be final subject to review by the Supreme Court upon certiorari or certification as provided in sections 1254(1) and [1254(3)] *1254(2)* of Title 28. The filing of an application for rehearing shall not, unless specifically ordered by the Corportation, operate as a stay of the Corporation's

order. The filing of a petition for review shall not, unless specifically ordered by the court, operate as a stay of the Corporation's order.

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TITLE 43—PUBLIC LANDS

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CHAPTER 34—TRANS-ALASKA PIPELINE

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§ 1652. Authorization for construction

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(d) NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 BY-PASSED; ISSUANCE OF AUTHORIZATIONS FOR CONSTRUCTION AND OPERATION NOT TO BE SUBJECT TO JUDICIAL REVIEW; TIME LIMITS ON CHARGES OF INVALIDITY OR UNCONSTITUTIONALITY; JURISDICTION; HEARINGS; REVIEW.— The actions taken pursuant to this chapter which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.]; and the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this chapter, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified. Any such complaint shall be filed in a United States district court, and such court shall have exclusive jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided, and no other court of the United States, of any State, territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any such claim whether in a proceeding instituted prior to or on or after November 16, 1973. Such court shall not have jurisdiction to grant any injunctive relief against the issuance of any right-of-way, permit, lease, or other authorization pursuant to this section except in conjunction with a final judgment entered in a case involving a claim filed pursuant to this section. [Any review of an interlocutory or final judgment, decree, or order of such district court may be had only upon direct appeal to the Supreme Court of the United States.] *An interlocutory or final judgment, decree, or order of such*

district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

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TITLE 45—RAILROADS

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CHAPTER 16—REGIONAL RAIL REORGANIZATION

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§ 719. Judicial Review

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(e) ORIGINAL AND EXCLUSIVE JURISDICTION.—

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(3) A final order or judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States[, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this chapter, in whole or in part, or of any action taken under this chapter, shall be reviewable by direct appeal to the Supreme Court of the United States in the same manner that an injunctive order may be appealed under section 1253 of Title 28.]. Such review is exclusive and any [petition or appeal shall be filed] *such petition shall be filed in the Supreme Court* not more than 20 days after entry of such order or judgment.

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§ 743. Valuation and conveyance of rail properties

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[(d) APPEAL.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 746 of this title may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of Title 28: *Provided,* That such appeal is exclusive and shall be filed in the Supreme Court not more than 20 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.]

(d) REVIEW.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States. Such review is exclusive,

and any such petition shall be filed in the Supreme Court not more than 20 days after entry of such finding or determination.

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CHAPTER 20—NORTHEAST RAIL SERVICE

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§ 1105. Judicial review

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(b) EXCLUSIVE REVIEW BY WRIT OF CERTIORARI TO THE SUPREME COURT.—A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States[, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this chapter or part 2 of the Conrail Privatization Act [45 U.S.C.A. § 1311 et seq.] shall be reviewable by direct appeal to the Supreme Court of the United States.]. Such review is exclusive and any [petition or appeal shall be filed] *such petition shall be filed in the Supreme Court* not more than 20 days after entry of such order or judgment.

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